APPENDIX A

UNITED STATES DISTRICT COURT

(Caption—No. 57 C 2021)

Memorandum

(Filed Sept. 23, 1958)

This is a libel of information brought by the Government under Title 21 U. S. C. § 334, for the condemnation of certain bottles of a drug called "Enerjol". The condemnation is sought on the grounds that the contents of the bottles are misbranded under Section 352 (a), and that "Enerjol" is a "new drug" under Section 355 (a), as to which no effective application has been filed under Section 355 (b).

The claimant has moved to dismiss the libel and for a summary judgment. The sole basis for the motion is that in September, 1957, claimant entered into an agreement with the Post Office Department in an action brought against claimant by that Department under the provisions of Title 39 U. S. C. Sections 259 and 732, and allegedly concerned with the same product and same labels as those here involved. It is claimant's position that in view of the former proceedings, and the agreement, the present libel subjects claimant to a "multiplicity of actions" and "unjust harassment", and that the agreement in the post office section is a bar "in effect akin to the legal principle of res adjudicata".

The last argument is clearly in error. The doctrine of res adjudicata applies only when there has been an actual adjudication of the same issues in a prior pro-

ceeding. [United States v. International Building Co., 345 U. S. 502, 505 (1953)].

Such is not the case here. In the Post Office proceeding, the issue was actual intent to deceive by means of false or fraudulent pretences [Reilly v. Pinkus, 338 U. S. 276 (1949)]. Here, the issue is whether the article is misbranded. It is settled in this Circuit that "the offense of using the mails to defraud and the offense of introducing or delivering for introducing into interstate commerce misbranded drugs are not the same, and hence there is no res judicata". [United States v. Kaadt, 171 F, 2d 600, at 605 (7th Cir., 1949); see also United States v. 42 Jars etc., 160 F. Supp. 818, 821 (D. N. J. 1958)].

Claimant argues that he is not contending that the traditional doctrine of res adjudicata applies, but that something "akin" to it is involved. This argument also must fail. However far one might stretch the traditional doctrine, it must at least involve some form of prior adjudication definite enough to form a standard against which the current action can be measured. In the instant situation there was no adjudication of any sort in the Post Office action. The agreement (attached to the motion) shows that claimant there merely agreed to refrain from making certain representations in the future. If this amounts to anything, it is an admission by claimant against his interests in this suit. Finally, the agreement provides that it "will not act as a defense for violation of any other statute". This in itself should preclude its use here.

The argument that claimant is being subjected to "multiplicity of actions" and "undue harassment" is a specious one. It is perfectly apparent that the purposes and effect of the Post Office action and one for condemnation are entirely different and that the two remedies are

properly distinct and co-existent. [United States v. One Dozen Bottles, 146 F. 2d 361, 363 (4th Cir., 1944)].

For the foregoing reasons, the motions to dismiss and for a summary judgment are denied.

PHILIP L. SULLIVAN
Judge

September 23rd, 1958

Decree of Condemnation

UNITED STATES DISTRICT COURT

(Caption—No. 57 C 2021)

This case having come before the Court on the motion of R. Tieken, the United States Attorney for the Northern District of Illinois, pursuant to Rule 37 (d) of the Rules of Civil Procedure for the United States District Courts, for an order of default decree of condemnation against the above described article for failure of the claimant, Owen Laboratories, Inc., to serve answers to written interrogatories propounded pursuant to Rule 33 of the Federal Rules of Civil Procedure:

And it appearing to the Court, after being fully advised in the premises, that on April 15, 1958, libelant served upon claimant, Owen Laboratories, Inc., written interrogatories pursuant to Rule 33 of the Federal Rules of Civil Procedure;

And it further appearing that the Court has heretofore entered an order in this cause requiring the claimant to answer the said written interrogatories;

And it further appearing that on September 29, 1958, the claimant, Owen Laboratories, Inc., filed a paper declining to answer libelant's written interrogatories on the ground of self-incrimination, it is

Ordered, Adjudged, And Decreed that the motion of libelant for default decree of condemnation pursuant to Rule 37 (d) of the Federal Rules of Civil Procedure, for failure of the claimant to answer interrogatories be, and hereby is, granted; and it is further

Ordered, Adjudged, And Decreed that the article of drug under seizure be and hereby is, condemned and forfeited to the United States of America pursuant to 21 U. S. C. 334 (a); and it is further

Ordered, Adjudged, And Decreed pursuant to 21 U. S. C. 334 (d) that the United States Marshal for this District shall destroy said article under seizure and make due return to this Court; and it is further

Ordered, Adjudged, And Decreed pursuant to 21 U. S. C. 334 (e) that the United States of America shall recover from Owen Laboratories, Inc., claimant herein, Court costs, fees, storage and other proper expenses.

Dated at Chicago, Illinois, this
22nd day of October, 1958.

/s/ PHILIP L. SULLIVAN
United States District Judge

—o—

Opinion of the United States Court of Appeals for the Seventh Circuit

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 12514

SEPTEMBER TERM, 1958—JANUARY SESSION, 1959

UNITED STATES OF AMERICA,
Libelant-Appellee,

v.

3963 Bottles, more or less, of an article of drug labeled in part: "• • • ENERJOL DOUBLE STRENGTH" • • • OWEN LABORATORIES, INC.,
Claimant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

MARCH 31, 1959

Before DUFFY, *Chief Judge,* HASTINGS and KNOCH, *Circuit Judges.*

HASTINGS, *Circuit Judge.* The Government, libelant-appellee, brought this action under the provisions of the

Federal Food, Drug and Cosmetics Act, 21 U.S.C.A. §§ 301 *et seq.*, for the condemnation and seizure of a drug called "Enerjol." The corporate claimant, Owen Laboratories, Inc., refused to answer the libelant's interrogatories on the ground of self-incrimination and the district court thereupon entered a default decree of condemnation. This appeal is taken from that decree and from an order of the district court denying claimant's motion for dismissal of the libel and for summary judgment.

The instant suit was commenced in December of 1957. The amended libel charged that the drug, "Enerjol," was misbranded while held for sale after shipment in interstate commerce within the meaning of 21 U.S.C.A. § 352(a), and also alleged that the drug was a "new drug" which was introduced into interstate commerce without an effective new drug application as provided in 21 U.S.C.A. § 355(a) and (b).

Prior to this action, in September of 1957, the Post Office Department had issued a fraud complaint against Owen Laboratories, Inc., charging it with having obtained money through the mails by means of fraudulent representations regarding the nature of and benefits to be obtained from the so-called "Enerjol Capsules." In order to avoid having a fraud order entered against it, Owen Laboratories filed an "Affidavit of Agreement" in which it consented to cease making the representations charged to be fraudulent in the Post Office complaint.

Claimant moved for a dismissal of the instant suit and for summary judgment, on the ground that the agreement with the Post Office, entered into after initiation of the mail fraud proceeding, was, in effect, an adjudication[1]

[1] By "adjudication" claimant refers to any type of administrative action. It argues extensively in its brief for the adoption by this court of a new rule of *"res administrata"* embodying principles "akin to the legal principle of *res adjudicata*" but tailored to fit problems peculiar to administrative law.

with respect to the identical product, the identical literature and identical issues involved in this libel; and that the agreement "constitutes a bar to the present action and is in effect akin to the legal principle of *res adjudicata*." The district court denied this motion setting forth its reasoning in a brief memorandum opinion which indicates that it fully understood and rejected claimant's arguments made before that court and renewed in this appeal. We hold that the district court committed no error in denying this motion.

The mail fraud proceeding could not possibly be a bar to the instant action. In the first place, the agreement executed by claimant in connection with the mail fraud proceeding is, by its own express terms and contrary to claimant's contentions, not an approval or ratification of any business conducted or to be conducted by claimant. The agreement further states expressly that "its filing will not act as a defense or relieve the undersigned [claimant's president] of responsibility for violation of any other statute . . . ."

Further, when stripped of its refinements, claimant's position appears to be that the Postmaster General, with his limited authority under the mail fraud statutes, could and should have somehow effectively enforced the provisions of the Federal Food, Drug and Cosmetics Act; and that, since he did take some action, as evidenced by the agreement, the Government is now barred from enforcing that Act against the offending product.

Viewing claimant's contentions in this light merely points up the fact that the proceeding under the mail fraud statute and the instant one differ not only as to issues involved, but also as to purpose and effect. The Postmaster General has only the limited authority to prohibit the fraudulent use of the mails, and the sole pur-

pose of a mail fraud proceeding is to enjoin the continuation of conduct found fraudulent. *Donaldson* v. *Read Magazine, Inc.*, 333 U. S. 178, 191 (1948). There must be proof of a fraudulent purpose, an actual intent to deceive, on the part of the alleged violator. *Reilly* v. *Pinkus*, 338 U. S. 269, 276 (1949).

On the other hand, the present suit under the Food, Drug and Cosmetics Act has as its purpose the seizure and actual removal of the allegedly offending articles from the channels of trade. Under this Act, no proof of wrongful or fraudulent intent is required either in criminal proceedings brought under its provisions, *United States* v. *Dotterweich*, 320 U. S. 277, 281, 284-285 (1943), or in seizure cases such as the instant one. *Research Laboratories* v. *United States*, 9 Cir., 167 F. 2d 410, 420-421 (1948); *United States* v. *Five Cases, etc.*, 2 Cir., 156 F. 2d 493, 495 (1946). The Supreme Court in *Dotterweich* pointed out that by this Act, as amended in 1938:

> "* * * Congress extended the range of its control over illicit and noxious articles * * *. The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self protection. * * * In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger." *United States* v. *Dotterweich, supra* at 280-281.

In the libel in this case the drug is alleged to be subject to seizure not only as misbranded (falsely labeled) but also as a new drug introduced into interstate commerce without an effective new drug application to establish its safety as is required by law. The proceeding and resulting agreement under the mail fraud act could be no bar to this suit.

Reliance by claimant on *United States* v. *Willard Tablet Co.*, 7 Cir., 141 F. 2d 141 (1944) is misplaced. In that case, a prior decision by the Federal Trade Commission had *approved* statements used by an alleged violator and ruled that the statements were not false representations. We hold that a subsequent condemnation proceeding, under the Federal Food, Drug and Cosmetics Act based on identical statements as to the same product was barred, on principles of *res adjudicata*, because the same issues and elements of proof were involved in both proceedings. The case of *George H. Lee Co.* v. *Federal Trade Commission*, 8 Cir., 113 F. 2d 583 (1940) also cited by claimant is to the same effect.

Claimant also relied heavily, in its brief, on the case of *United States* v. *Radio Corporation of America and National Broadcasting Company, Inc.*, E. D. Pa., 158 F. Supp. 333 (1958). In that case the district court decided that approval by the Federal Communications Commission of a proposed exchange of radio and television stations, precluded a subsequent suit in which the Government sought to upset the transaction as violative of the anti-trust laws. However, just prior to oral argument in the present case, the Supreme Court of the United States, having noted probable jurisdiction at 357 U. S. 918 (1958), unanimously reversed the district court. *United States* v. *Radio Corporation of America and National Broadcasting Company, Inc.* .... U. S. .... (1959).[2] The Supreme Court held that the Federal Communications Commission had no power to decide anti-trust issues as such and that, consequently, its determination that the "public interest, convenience and necessity" would be served by the proposed exchange of radio and television stations did not bar the subsequent anti-trust suit. In so doing

[2] Mr. Justice Frankfurter and Mr. Justice Douglas took no part in the consideration or decision of the case.

the Court found *res judicata* principles inapplicable since, as in the instant case, different issues were involved. *Id.* at ..... In our view, this holding alone would be completely dispositive of claimant's contention.

It is next contended that the district court erred in entering the default decree of condemnation upon claimant's failure to answer libelant's interrogatories. The refusal of the corporation to answer was based on an assertion of a claim of privilege against self-incrimination. However, it is settled beyond possible doubt that a corporation has no such privilege to assert. *United States* v. *White*, 322 U.S. 694 (1944). In the *White* case, the Supreme Court stated clearly and unequivocally:

> "The constitutional privilege against self-incrimination is essentially a *personal* one applying only to *natural individuals*.
>
> "• • • [I]t cannot be utilized by or on behalf of any organization, such as a corporation." (Emphasis added.) (*id.* at 698-699).

See also *Fleming* v. *Montgomery Ward*, 7 Cir., 114 F. 2d 384, 386-387 (1940), cert. den., 311 U.S. 690.

In the face of this, claimant urges that a corporation may somehow assert the privilege against self-incrimination on behalf of itself, and a broad class of corporate officers and agents, because of what it terms the unique nature of the Federal Food, Drug and Cosmetics Act which imposes criminal liability on officers and agents of the corporation without requiring proof of wrongful intent or consciousness of wrongdoing.

It is true that this Act is an example of the so-called "public welfare statute" which requires no proof of wrongful intent. *Morissette* v. *United States*, 342 U.S. 246, 255-256 (1952); *United States* v. *Dotterweich*, 320 U.S. 277

(1943). However, criminal liability is not, as claimant seems to contend, imposed automatically under this type of law upon every officer or agent no matter how remote his connection with the offending corporation. In *Dotterweich*, the Supreme Court clearly enunciated the proper test. Criminal responsibility for violation of the Federal Food, Drug and Cosmetics Act attaches to those who have a *responsible share* in the furtherance of the transaction which the statute outlaws. "Whether an accused shares *responsibility* in the business process resulting in unlawful distribution depends on the evidence produced at the trial and its submission—assuming the evidence warrants it—to the jury under proper guidance." (Emphasis added.) *U.S.* v. *Dotterweich, supra* at 284.

It was the duty of this corporate claimant to select an agent who, without fear of self-incrimination, could provide the information requested. The interrogatories were addressed to the corporation and the answer sought was that of the corporation. There is no merit in claimant's suggestion that the answers to the interrogatories must be verified by an officer or managing agent of the corporation. Rule 33 of the Federal Rules of Civil Procedure, 28 U.S.C.A., provides that "any officer or agent" of a corporate party "shall furnish such information as is available to the party." It would indeed be incongruous to permit a corporation to select an individual to verify the corporation's answers, who because *he* fears self-incrimination may thus secure for the corporation the benefits of a privilege it does not have.

The default decree was entered by the district court pursuant to Rule 37(d) F.R.C.P., 28 U.S.C.A., which provides:

> "If a party or an officer or managing agent of a party wilfully fails to appear before the officer who

> is to take his deposition, after being served with proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may * * * enter a judgment by default against the party."

Claimant asserts that there was no *wilful* failure to answer since the officer of the corporation, in this case the president, properly asserted his constitutional privilege against self-incrimination even if the corporation had no such privilege. We have answered this contention above. Claimant had a duty to appoint an agent who could, without fear of self-incrimination, furnish such requested information as was available to the corporation. No attempt was made to do so.

The disjunctive wording of the rule, above, would seem to indicate that a showing of wilfulness is necessary only on failure to appear for deposition. Assuming that such is not the case, however, we hold that what is intended by "wilful failure" to comply with the rule is any intentional failure as distinguished from involuntary non-compliance. No wrongful intent need be shown. *Brookdale Mill Inc.* v. *Rowley*, 6 Cir., 218 F. 2d 728, 729 (1954).

But beyond that, we are singularly unimpressed with claimant's arguments, in view of the following statement made by claimant's president in an affidavit accompanying the motion to dismiss and for summary judgment: "I have not made any false or improper claims in connection with the marketing of this product. My products are marketed based upon extensive research and consultation with experts." Thus, though first representing to the court that it had such information available and implicitly offering it in support of this motion, when it was later served with

interrogatories seeking details of such "extensive research and consultation," claimant asserted its claimed privilege.

Finally, *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958) relied on by claimant is inapposite since in that case the Supreme Court felt that dismissal under Rule 37 was too harsh a remedy where there was evidence of a good faith effort to comply with the rule. No attempt was made to comply in this case.

We hold that the trial court did not err in entering the default decree upon proper motion by the Government and notice to claimant.[3]

The judgment and decree of condemnation is

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

---

[3] In their briefs both parties refer to *United States* v. *42 Jars, etc.* * * * *Bee Royale Capsules*, D.C.D. N.J., 160 F. Supp. 818 (1958) and 162 F. Supp. 944 (1958), and note an appeal pending therefrom in the Third Circuit. In an opinion filed March 12, 1959, the Court of Appeals for the Third Circuit affirmed, deciding the issues identical to those considered in the instant appeal agreeable with the result reached in this opinion, *viz*: that the action taken by the Post Office Department upon its fraud complaint and subsequent settlement was no bar to the action brought under the Federal Food, Drug and Cosmetics Act, (thus rejecting the proposed rule of *"res adminis'rata"*, see note 1, *supra*); that the corporate claimants could not resort to the Fifth Amendment as a basis for refusing to answer interrogatories, and that it was within the trial court's discretion to enter a default judgment under Rule 37(d), F.R.C.P., 28 U.S.C.A., by reason of such failure to answer. Thus, we find ourselves in complete agreement with the Third Circuit although, in our consideration and determination of this case we did not have the benefit of its prior holding.

Decree of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Tuesday, March 31, 1959

Before

HON. F. RYAN DUFFY, Chief Judge
HON. JOHN S. HASTINGS, Circuit Judge
HON. WIN G. KNOCH, Circuit Judge

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 12514

UNITED STATES OF AMERICA,
Libelant-Appellee,

vs.

3963 Bottles, More or Less, Etc., OWEN LABORATORIES, INC.,
Claimant-Appellant.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

The mandate of the Court of Appeals was stayed on April 16, 1959.

APPENDIX B

Statutes

The Federal Food, Drug and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1040 (21 U. S. C. 301, et seq.), provides in pertinent part:

Sec. 301. The following acts and the causing thereof are hereby prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded; • • •

Sec. 301 (d). The introduction or delivery for introduction to interstate commerce of any article in violation of section 404 or 505.

Sec. 303 (a). Any person who violates any of the provisions of section 301 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine.

Sec. 304 (a). Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce, or which

may not, under the provisions of section 404 or 505, be introduced into interstate commerce, shall be liable to be proceeded against while in interstate commerce, or at anytime thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: *Provided, however*, That no libel for condemnation shall be instituted under this Act, for any alleged misbranding if there is pending in any court a libel for condemnation proceeding under this Act based upon the same alleged misbranding, and not more than one such proceeding shall be instituted if no such proceeding is so pending except that such limitations shall not apply (1) when such misbranding has been the basis of a prior judgment in favor of the United States, in a criminal, injunction, or libel for condemnation proceeding under this Act, or (2) when the Administrator has probable cause to believe from facts found, without hearing, by him or any officer or employee of the Agency that the misbranded article is dangerous to health, or that the labeling of the misbranded article is fraudulent, or would be in a material respect misleading to the injury or damage of the purchaser or consumer. In any case where the number of libel for condemnation proceedings is limited as above provided the proceeding pending or instituted shall, on application of the claimant, seasonably made, be removed for trial to any district agreed upon by stipulation between the parties, or, in case of failure to so stipulate within a reasonable time, the claimant may apply to the court of the district in which the seizure has been made, and such court (after giving the United States attorney for such district reasonable notice and opportunity to be heard)

shall by order, unless good cause to the contrary is shown, specify a district of reasonable proximity to the claimant's principal place of business to which the case shall be removed for trial.

Sec. 502. A drug or device shall be deemed to be misbranded—(a) If its labeling is false or misleading in any particular.

Sec. 505. (a) No person shall introduce or deliver for introduction into interstate commerce any new drug, unless an application filed pursuant to subsection (b) is effective with respect to such drug.

The Federal Rules of Civil Procedure provides in pertinent part:

Rule 33. Interrogatories to Parties. Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may be served after commencement of the action and without leave of court, except that, if service is made by the plaintiff within 10 days after such commencement, leave of court granted with or without notice must first be obtained. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the persons making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the service of the interrogatories, unless the court, on motion and notice and for good cause shown, en-

larges or shortens the time. Within 10 days after service of interrogatories a party may serve written objections thereto together with a notice of hearing the objections at the earliest practicable time. Answers to interrogatories to which objection is made shall be deferred until the objections are determined * * *

Rule 37 (d). Failure of Party to Attend or Serve Answers. If a party or an officer or managing agent of a party willfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

The United States Constitution, Amendment 5, provides as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.